IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944

No. 935

LOUIS COMPAGNA, PAUL DE LUCIA,
PHIL D'ANDREA, CHARLES GIOE
and JOHN RUSSELLA,

Petitioners,

vs.

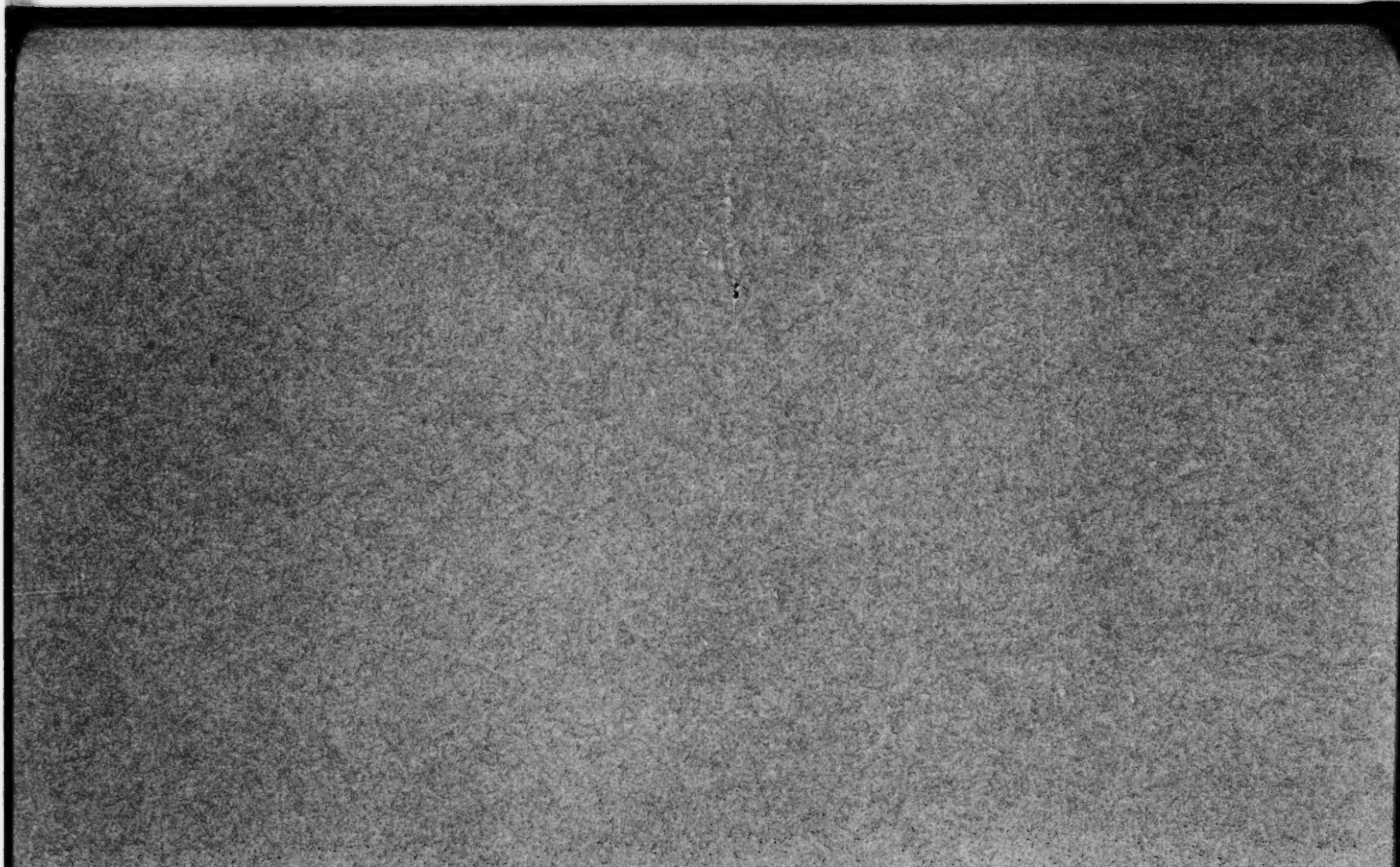
UNITED STATES,

Respondent.

PETITION FOR REHEARING

ON DENIAL OF PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

WM. SCOTT STEWART,
Counsel for Petitioners.



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PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

Our petition for certiorari was denied April 2, 1945. The Court announced no grounds and cited no authorities. It would be next to impossible for us to guess the reason which impelled each justice to vote against our petition, in order that an effort be made, from the record, to change his mind. We know of no criminal case in which certiorari has been granted after it was once refused, so we are fully aware of the desperate nature of our present

situation. As in a sinking ship, we have thrown overboard all but the following vital defects in the record. We ask your Honors, upon reconsideration, to grant certiorari limited to this vital matter, and request that we be given a place on the summary docket, or that the merits be summarily decided upon briefs. Your petitioners are in the penitentiary where they have been since the entry of the judgment, serving ten year sentences. We have nothing to gain by mere delay. We shall present our point again from a different approach in the hope that we make it clear. We hope to strengthen it and by abandoning everything else, we seek to avoid confusion.

Our last stand is upon the first "Question Presented"[1] (our Petition p. 12).

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[1]We copy from our Petition herein (p. 12):

C

QUESTIONS PRESENTED

VENUE

1. In a criminal prosecution where it appears that the defendants have been removed from the district of their home for trial and the only allegation as to venue is a charge that the conspiracy was formed in the district of trial, can the conviction be sustained where the undisputed evidence shows the formation of the conspiracy in the district from where the defendants were removed.

Is the answer to this question affected by evidence showing that some of the conspirators performed acts within the district of trial in furtherance of the conspiracy if it be kept in mind that there are no overt acts alleged, and that the performance of such acts are not referred to in the pleading?

This can be put more forcibly by our present claim that in the light of the constitution and fundamental rules of pleading this indictment and record fails to support the judgment. The error is such that it should be noticed under the principle that in the federal courts relief is granted from plain error and that fundamental constitutional rights are never waived. The rights we seek are committed by law to the protection of this court.[2]

In the new Rules for Criminal Procedure, (not yet in effect) it is provided[3] that the trial judge might transfer

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The Solicitor General restated our question as follows (p. 2):

> "1. Where there was a fatal variance between the indictment and the proof with respect to venue and knowledge by the grand jury of persons referred to in the indictment as unknown."

The government mixed our vital point with another point relatively unimportant. We did not unscramble our points in reply because we assumed that your Honors have often seen that method employed. It is possible, of course, that such method contributed to the failure on the part of your Honors to perceive the importance of our real point.

[2] Our points were urged without success upon the courts below and all necessary steps have been taken to secure review. We mention plain error to show the seriousness of the matter and also because of the defense made here by the government.

[3] Rule 21 (b) OFFENSE COMMITTED IN TWO OR MORE DISTRICTS OR DIVISIONS. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

proceedings in the interest of justice. If the method adopted by the prosecution in the case at bar has the sanction of this court, the new rule can be circumvented by a false allegation of venue.

We assume, of course, that the new rules reflect a desire upon the part of this court to correct known abuses and to grant relief from plain error. The abuse of defendants by transporting them to distant parts of the United States for trial must surely be known to your Honors from the records of this court.

Constitution.

We rely upon Article III, Sec. 2, Clause 3[4] and the VI Amendment[5].

Your Honors recognized in *United States* v. *Johnson*, 323 U. S. 273, that questions of venue in criminal cases

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[4] The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such trial shall be held in the State where the said Crimes shall have been committed.

[5] In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

are not merely matters of form.[6] The commission of an overt act in furtherance of conspiracy and its allegation are necessary to give local venue (*United States* v. *New York Great Atlantic and Pacific Tea Co.*, 137 F. (2d) 459). This proposition seems to be taken for granted by your Honors in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, as a premise to the question in that case as to the sufficiency of the venue allegations. In the case at bar, no overt acts were alleged. Since our petition was filed there has been published the opinion in *American Tobacco Co.* v. *United States*, 147 F. (2d) 93, 162. In the *American Tobacco case* it was held that there was no error as to the instructions, but the fundamental principles invoked by us here are again recognized.

Also, since our petition was filed, we have learned that your Honors have affirmed *Frankfort Distilleries* v. *United States*, Vol. 89 Law Ed. p. 649, Reported below 144 F. (2d) 824 (C.C.A. 10). The record submitted to your Honors in the *Frankfort case* includes *United States*

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[6] Mr. Justice Reed in dissenting (323 U.S. 280) gave reasons which might require a trial in the district where the dentures were received. We assume that this was done in an effort to ascertain the meaning of Congress. No construction of any such statute is involved in our case. All of your Honors must agree including Mr. Justice Reed, that if Johnson were to be prosecuted in Delaware, the indictment would be required to show facts from which venue could be established.

No good reason can be found in the record for the transportation of these defendants in the case at bar, and the reasons are of no importance one way or another under the circumstances. The reasons underlying the constitution are not now open to debate.

Your Honors might very well divide upon the power of Congress to provide for venue in such as the *Johnson case*, but there can be no dispute on fundamental requirements of an indictment. Such rights are also protected by the constitution. Our point as to the deficiency of our indictment was not involved in the *Johnson case*.

v. *Safeway Stores,* 51 Fed. Supp. 448.[7] Many of the questions in the case at bar are fully discussed in the briefs filed in the *Frankfort case.*[8]

We have copied the indictment as an appendix here in a separate volume (p. 7) submitted with our petition and marked "APPENDICES". We request your Honors to again examine the indictment in the light of our claim that it will not support the judgment.

As appears from the record (R. 28), your petitioners, in a motion for a bill of particulars, requested the following information which was refused (R. 40):

> 1. State the time when and place where the defendants or any of them first conspired to commit the crime charged in the indictment.
>
> * * *
>
> 3. State whether there was any subsequent agreement or agreements among the defendants or any of them to commit the crime charged in the indictment, and if so, state the time or times when, and the place or places where such agreement or agreements were made, and the names of the individuals who entered into said agreement or agreements.

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[7] We cited the *Safeway Stores* case in our brief here (pp. 6, 19, 27) and now recommend it as the best explanation of the law to be found upon the proposition that the indictment must contain specific overt acts sufficient for venue purposes. It does not seem right that the only full discussion of our point is to be found in a trial court opinion. We here present an opportunity for this court to speak with authority upon a subject of great importance and of public interest.

[8] The venue question was decided against the defendants in the Circuit Court of Appeals in the *Frankfort case.* It finally resolved itself into a construction of the indictment. The government did not have the temerity to submit the case to the jury upon an indictment such as ours. The decision of this court in the *Frankfort case* did not involve the venue question which appears to have been abandoned by the defendants in that case.

4. State whether any overt act or acts were committed in pursuance of the conspiracy.

5. If the answer to item "4" is in the affirmative, set forth:

(a) The act or acts committed in pursuance of the conspiracy;

* * *

(c) The place where said act or acts were committed;

(d) The time when said act or acts were committed.

Of course, a bill of particulars could not have cured this defective indictment. The refusal supports our claim that the government purposely deceived the defense, and that the lower courts refused relief when fundamental rights were requested.

Since our Petition was filed in this court, the case of *Winebrenner* v. *United States*, 147 F. (2d) 322 (C.C.A. 8) was decided. Although reversed upon other grounds, it held that under the conspiracy statute, venue may be laid at any place where any act has been done by any one of the conspirators in furtherance of conspiracy, and that evidence of overt acts done in Western District of Missouri in furtherance of conspiracy to defraud the United States was sufficient to establish venue in that district of prosecution for such offense, though conspiracy was not formed there. We conclude that some of the acts relied upon to establish venue were alleged in the indictment. There is no discussion of our point. All courts in all cases but ours seem to assume that the point is too obvious for discussion. Permit us to review the cases cited in the *Winebrenner case*.

In *Galatas* v. *United States*, 80 F. (2d) 15, 24 (C.C.A.

8) overt acts within the district of trial are pointed out. In *Sloan* v. *United States*, 31 F. (2d) 902 (C.C.A. 8) cited in the *Galatas case*, the overt acts were alleged. We quote from the *Sloan case* (904):

> "To constitute the crime of conspiracy under federal statutes, two things are necessary: An agreement, and an overt act in pursuance thereof. Except as a matter of venue, it makes no difference where either the agreement or the overt act takes place in order to constitute the crime. The only reason for stating such in an indictment is to fix the venue. Here, both the conspiracy and the overt acts were stated as occurring in the Western District. Proof that either occurred there would sustain such venue. If an overt act were proven within that district, the allegation as to place of agreement (conspiracy) would lose all importance so far as being an essential element requiring proof."

It would seem to follow that if no overt acts are alleged and the only venue allegation was that the conspiracy was formed in the district of trial, that that allegation would have to be proved as laid.

In *Hartzell* v. *United States*, 72 F. (2d) 569, 576 (C.C.A. 8), the sufficiency of the indictment was challenged in a mail fraud case. It will be noticed that sufficient facts were alleged as to the receipt of the letter in the district of trial to establish venue. In other words, the venue allegations were to be found in the indictment.

The opinion in *United States* v. *Downing*, 51 F. (2d) 1030 (C.C.A. 2) was written by Judge Learned Hand who wrote our opinion, and it is important to notice that the Second Circuit carries the rule to an extreme not sanctioned by any other court. We quote (1031):

> "Since jurisdiction depends upon where the crime is committed, and it is committed wherever any part of the agreement is performed, the act of performance

relied upon need not be an overt act laid in the indictment."

Judge Hand cited *Hyde* v. *United States*, 225 U. S. 347; *Brown* v. *Elliott*, 225 U. S. 392, and *Ford* v. *United States*, 273 U. S. 593, and carried them a step further which we submit is not the law. Such rule was, no doubt, applied by the Second Circuit in our case, and it conflicts with decisions in other circuits. (*United States* v. *Hosier*, 50 F. (2d) 971, (D. C. 5).)

In *Ford* v. *United States*, 273 U. S. 593, is said in the *Winebrenner case* to be on all fours with it is different from ours in that overt acts were alleged and proved. The rule we contend for was assumed to be fundamental without discussion in the *Ford case*.

United States v. Kissel.

The *Kissel case* is the leading case as authority for the proposition that a conspiracy may be continuous.[9]

Since the day your Honors denied our petition, we have examined the records of this court in the *Kissel case* (218 U. S. 601, No. 390, Oct. 1910). Your Honors will notice that Mr. Justice Holmes was very careful to limit the opinion of this court to mean no more than the possibility of the existence of a continuous conspiracy.[10] We concede that such a conspiracy may exist, the fact remains

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[9] There is a powerful argument to the contrary but we accept the rule as settled by the *Kissel case*. The *Kissel case* does not mean that every conspiracy is a continuous one, or that it must be so whenever the government so designates it.

[10] The indictment in the *Kissel case* alleges facts as to the formation of the conspiracy in the district of trial and contains numerous overt acts specified in the trial district.

that such a conspiracy must be properly pleaded.[11] Judge Holmes said (606) after noting the limitation on this court when an indictment is quashed:

> "This being so, we are not concerned with the technical sufficiency or redundancy of the indictment, or even, in the view that we presently shall express, with any consideration of the nature of the overt acts alleged."

It can be seen from the facts stated in the *Kissel* indictment that the conspiracy there alleged in the indictment may very well have been a continuing one.

There are no facts stated in the case at bar. The pleader rested upon a mere conclusion that the conspiracy continued. Our right to review is much broader than that afforded the government in the *Kissel case.*[12] We have the absolute right under the rules of pleading to ask your Honors to disregard the conclusion and view the indictment as if the words "continuously thereafter" were eliminated. But we do not need to stand upon any such rule, we can give the government more than it is entitled to and still point out the fatal defect. We assume for the purpose of this argument that the conspiracy

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[11] The instructions are copied (p. 37) from the record in the case at bar in the volume marked "Appendices" furnished with our Petition for Certiorari. Commencing at p. 61 of the Appendices your Honors will perceive that we have emphasized the errors of the court in the matter of taking these vital questions from the jury. The court assumed that the conspiracy was in fact continuous and did not require proper pleading of overt acts or the allegation of any facts as a basis for the claim that the conspiracy was continuous, or that the New York court in fact had jurisdiction.

[12] In our case the demurrer filed by the government (R. 27) to the Plea in Bar (R. 22) claiming the benefit of the Statute of Limitations raised the question of the sufficiency of the indictment. This question was raised by demurrer and motion to quash (R. 19) and in every other conceivable manner in our case.

was continuous, yet, because of venue and the limitations statute, overt acts were necessary and should have been pleaded.

The indictment alleges that the conspiracy was formed "on or about the 18th day of June 1934." This shows upon its face that the Statute of Limitations had run.[13]

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[13] This challenge was made by way of special plea, (R. 20) demurrer and motion to quash, (R. 19) motion for directed verdict, (See Index to Record Volume I) arose on the instructions (See Appendix) and was assigned as error (R. Vol. V., pp. 4056, 4082, 4083, 4095, 4098, 4099). The Circuit Court of Appeals regarded the point as trivial (Appendices pp. 96, 97).

On or about June 18, 1934 could mean June 17, 1934, on which date the Anti-Racketeering Act was not in effect, and there could have been no such conspiracy.

We quote from the dissent in *United States* v. *Perlstein*, 126 F. (2d) 789, 804 (C.C.A. 3). We quote from the dissent because that is the only place our point is discussed in a manner applicable to our case. The majority opinion recognizes the principle but distinguishes the *Perlstein case* in a way peculiar to the charge there made (obstructing justice):

> "Nor does the conspiracy become criminal, after a proceeding is instituted, on the ground that it is a continuing thing. Most conspiracies are continuous in the sense that they ordinarily endure for a period of time for the achievement of their intended end. But, where a conspiracy has been held to be continuous, it will be found to have been a conspiracy for the commission of an offense committable from the outset and, so, capable of continuing for successive achievements of the same purpose, such as combinations in restraint of trade. See *United States* v. *Kissel*, 218 U.S. 601, 607. It is also believed that no case can be found where the alleged conspiracy entered into when its offensive object was legally uncommittable has been held to continue until the offense could be committed and thereupon rendered criminal thereby. * * *
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> "The motion to quash was none the less sufficiently timely. The question of the insufficiency of the indictment in the particular now under consideration was raised in the court below, was fully argued by counsel and was considered and passed upon by the learned trial judge on its merits. The question could even have been raised in this court for the first time. *Rosen* v. *United States*, 161 U. S. 29, 33; *Sonnenberg* v. *United States*, 9 Cir. 264 F. 327, 328. See Zoline, Federal Criminal Law and Procedure (1921), Sec. 216. Moreover, the motion in arrest of judgment after verdict at the second trial brought the question squarely upon the record."

In the case at bar, if the indictment had mentioned no time as to the formation of the conspiracy, it would have been good if it had alleged time in overt acts (*Heskett* v. *United States,* 58 F. (2d) 897). When the time of the formation of the conspiracy is left to conjecture some facts must be made to appear somewhere as against the objection that the statute of limitations has run. If overt acts had been alleged, the government would have been required to prove at least one of them (*United States* v. *Hosier,* 50 F. (2d) 971).

We submit that, for the purpose of this discussion, there are three parts of an indictment which might disclose a continuous conspiracy, *i. e.*:

(a) the object,

(b) the means,

(c) the overt acts.

(a) *The object* of the conspiracy is pleaded in the language of the statute.[14] Roughly speaking, the object was

[14] Please see our brief (p. 21) where we copied from the indictment, *i. e.*:

> "in connection with and in relation to acts affecting foreign and interstate trade and commerce and articles moving and about to move in such trade and commerce, did unlawfully, wilfully and knowingly conspire, combine, confederate and agree together and with each other to obtain and to attempt to obtain by the use of and attempt to use and threat to use force, violence and coercion, the payment of money, to-wit, upwards of $1,000,000, and other valuable sums of money and said valuable considerations being to the Grand Jurors unknown, from a group of corporations,"

including (naming companies, plus unknowns)

> "all of the aforesaid being hereinafter referred to as the victims, and to obtain the payment of said money and said other valuable considerations, said moneys and said considerations being the property of the aforesaid victims, with the consent of said victims induced by wrongful use of force and fear."

to obtain a sum of money. This object can be compared with murder, bribery, burglary, or any specific crime to be accomplished by some act.[15] When the person is killed to effectuate the object of a conspiracy to murder that is the end of the business. In the absence of some special facts, there is no reason to suppose that persons are going to continue to conspire to kill some one over the years without intending to commit the murder. It is more reasonable to assume that they agreed at the outset to get it over with.

In the case at bar the object, as we have said, was to obtain a sum of money. If the money were obtained in 1934, it is repugnant to suppose that the conspirators continued to conspire to get what they already had.

(b) *The means.* The indictment in the case at bar furnishes no means. It alleges that as a part of said conspiracy the defendants would do certain things (Appendix p. 9). There is nothing about these allegations from which it might be concluded that it was intended that the conspiracy continue over a period of years or longer than necessary to obtain the sum of money.

(c) *The overt acts.* No overt acts are alleged.

Suppose for the purpose of argument that on June 18, 1934 your petitioners drew up a written agreement providing that over a period of twenty years they would work together to obtain a continuous supply of money.[16] That would be a conspiracy intended by its terms to continue. But suppose that no one did anything about

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[15] The Anti-Racketeering Act requires *acts*. It does not cover the same field as the Sherman Act. We are not dealing with restraint of trade which requires a continuous course of conduct.

[16] The indictment in the case at bar does not allege any continuous supply of money. Such a case as we use for argument can not be read into our indictment at all.

it, that they just did nothing. The Statute of Limitations would run from the time of the agreement, and that would be the end of the matter. Of course, the conspiracy here supposed could have been prosecuted at any time within three years of its formation, at the place of its formation, without any overt acts.

To suppose another case, if the agreement was made and an overt act committed in 1934, the Statute of Limitations would run from the act. If more than one overt act were committed the statute would run from the last overt act.[17]

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[17] The various Circuits are in conflict upon this subject, but we need not notice the conflicts. We grant the government the most favorable decisions and say that the statute would run from the last overt act.

We quote from *Breese* v. *United States*, 203 Fed. 824, 829 (C.C.A. 4):

> "The next assignment to be discussed relates to a claim of limitation. It is contended on behalf of the defendants that the evidence showed that the offense charged in the indictment was committed more than three years before the finding of the indictment (October 5, 1897), and that the prosecution was therefore barred by the three year statute of limitations. R. S. Sec. 1044, 2 Fed. Stats. Ann. 358 (U. S. Comp. St. 1901, p. 725). The argument is that the conspiracy, if any, was formed more than three years prior to the indictment, and that acts in pursuance of and to effect the object of the conspiracy (R. S. Sec. 5440, 2 Fed. Stats. Ann. 247) were committed more than three years prior to the indictment. But it was also in evidence that acts to effect the object of and in pursuance of the conspiracy were committed within less than three years from the finding of the indictment. It must, we think, be admitted that where a conspiracy is formed more than three years prior to indictment, but where the first overt act is committed within the three years, the prosecution is not barred; and this simply because the offense has not been committed until the doing of the overt act. To say, in this connection, that the making of the corrupt agreement is the crime, is a perversion of the meaning of the Supreme Court in *U. S.* v. *Britton*, 108 U. S. 199. See *Hyde* v. *United States*, 225 U. S. 347, 359. Where, however, the con-

The government, in our supposed case, would be in no different position than if the defendants committed a burglary on June 18, 1934 (or on the day of the last overt act), and the government waited until 1940 to prosecute. A questioned indictment returned more than three years

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spiracy was formed more than three years prior to the indictment, and acts in pursuance thereof are done both prior to and within the three years, there has arisen a difference of opinion. *U. S.* v. *Owen* (D. C.), 32 Fed. 534; *U. S.* v. *McCord* (D. C.), 72 Fed. 159; *Ex parte Black* (D. C.), 147 Fed. 832, 841, and *U. S.* v. *Biggs* (D. C.), 157 Fed. 264, 273, support the theory that in such case the limitation bars the prosecution. The weight of authority, in our opinion, is to the contrary. See *Wilson* v. *U. S.*, 190 Fed. 427, 435, 111 C.C.A. 231; *Hedderly* v. *U. S.*, 193 Fed. 561, 569, 114 C.C.A. 227; *Jones* v. *U. S.*, 162 Fed. 417, 426, 89 C.C.A. 303; *Lonabaugh* v. *U. S.*, 179 Fed. 476, 478, 103 C.C.A. 56; *U. S.* v. *Bradford* (C.C.), 148 Fed. 413, 419; *U. S.* v. *Brace* (D. C.), 149 Fed. 874, 877; *Ware* v. *U. S.*, 154 Fed. 577, 579, 84 C.C.A. 503, 12 L.R.A. (N.S.) 1053, 12 Ann. Cas. 233; *U. S.* v. *Greene* (D. C.), 115 Fed. 347; *U. S.* v *Greene* (D. C.), 146 Fed. 803, 889; *Lorenz* v. *U. S.*, 24 App. D. C. 337, 387; *Com.* v. *Wishart*, 8 Leg. Gaz. (Pa.) 137; *People* v. *Willis*, 52 N. Y. Supp. 808; *People* v. *Arnold*, 46 Mich. 268, 9 N. W. 406; *Amer. Ins. Co.* v. *State*, 75 Miss. 24, 35, 22 South. 99, 102; *Ochs* v. *People*, 25 Ill. App. 379, 414; 6 Am. & Eng. Ency. (2d Ed.) 844; 1 Bishop's New Cr. Proc., Sec. 61; 2 Bishop's New Cr. Proc., Sec. 206; 29 Am. & Eng. Ency. (2d Ed.) 165. That a conspiracy may be a continuing offense, and that prosecution for a conspiracy formed more than three years prior to the indictment is not barred, if it be alleged and proved that the conspiracy continued in force and operation within the period of limitation, is settled by *U. S.* v. *Kissel*, 218 U.S. 601, reversing *U. S.* v. *Kissel* (C.C.), 173 Fed. 823.

"The doing of an act by one conspirator, with the knowledge and consent of the others, in pursuance of an agreement made long previously, and to carry out the purpose of such agreement, necessarily implies at least a tacit renewal of the conspiracy. A conspiracy such as is charged here continues until its purpose has been fully effected or until it has been abandoned. The offense consists, not in the mere agreement, but in the existence of the conspiracy, and the doing of an act to effect the object of the conspiracy. The making of the unlawful agreement and the doing of the overt act more

after the offense with the naked allegation of a burglary in 1934 would not support a judgment.[18]

In the case at bar, we need not concern ourselves with the exceptions to the Statute of Limitations as in those cases where a defendant becomes a fugitive. The government made no such claim. It demurred to the plea of the statute of limitations and resisted the motion to quash solely upon the four corners of the indictment. The point was before the trial court after the evidence demonstrated that the Statute of Limitations had run and after the trial court could see that the indictment failed to support the judgment. The government was compelled to rely

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than three years prior to indictment undoubtedly completes *an offense*, but not necessarily the offense charged in the indictment. The offense charged is a conspiracy, formed by tacitly or expressly agreeing to continue in force a conspiracy originally entered into more than three years prior to the indictment, and the commission of overt acts within the three years. The indictment in the case at bar charged that the conspiracy was formed July 1, 1897, and that the overt act was committed on that date. As time is not of the essence of such a charge, it was permissible to allege one time and prove another. Evidence of a conspiracy formed more than three years prior to the indictment, and of acts done within three years by the different defendants, with the knowledge and consent of the others, in pursuance of and to carry out the purpose of the original conspiracy, clearly support such an indictment notwithstanding evidence of similar overt acts committed more than three years prior to the finding of the indictment. See *Hyde* v. *U. S.*, 225 U. S. 347, 369, *Heike* v. *U. S.*, 227 U. S. 131. The instructions asked by the defendant on this point are all based on an erroneous theory, and it was not error to refuse to give them. The charge given by the learned trial judge in respect to this feature of the case is not open to any exception taken to it."

[18] It seems as if in the federal courts the allegation of a date barred by the Statute of Limitations is sufficient to support the judgment if the defect is not objected to and a proper record made. There was no waiver in the case at bar, and there is no legal method by which our point can be evaded.

upon two words alone, "continuously thereafter." That is our position here.[19]

Nash v. United States.

Nash v. *United States* (229 U.S. 373, No. 197, Oct. 1912) was reversed on other grounds, but it appears to be the leading case for the proposition that no overt act need be pleaded in Sherman Act cases. The *Nash case* holds that the conspiracy made unlawful by the Sherman Act is the conspiracy at common law.[20]

The indictment in the *Nash case* was returned April 8, 1908, charging that the conspiracy was formed in the district of trial on May 1, 1907, so our point was not involved.[21]

Our point can not be evaded because of any technicality as to the manner in which it was raised. Judge Hulbert filed a written opinion (R. 37) in which he disposed of all the preliminary motions together. Our point was regarded as having been properly raised.[22] It will be

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[19] This point is assigned as error in our brief (p. 3, Point 4) and argued under Point One (p. 14). It is possible that it was overlooked because of having been woven into related objections to the indictment.

[20] At common law there was no such thing as a Statute of Limitations (*Dover* v. *Maester*, 5 Esp. 92; *Hyde* v. *Partridge*, 3 Salk, 227, 228). The *Nash case* did not involve the statute of limitations or venue.

[21] It will be noticed that in the *Nash case* the facts are set out in the indictment, means alleged to have been employed are described and a bill of particulars was awarded. Our record is barren of such matters.

[22] We quote from the opinion by Judge Hulbert (R. 39):

> "Defendants' counsel asserts that the cases (*U. S.* v. *Kissel*, 218 U.S. 601; *U. S.* v. *Barber*, 219 U.S. 73; *U. S.* v. *Oppenheimer*, 242 U.S. 85; *U. S.* v. *Ames*, 39 Fed. Supp., 885) cited and chiefly relied upon in support of the Govern-

seen that Judge Hulbert believed that the *Nash case* relieved the prosecutor from the allegation of overt acts, even where Judge Hulbert knew that the defendants were making a point of the Statute of Limitations. Judge Hulbert failed to perceive the point and therefore was unable to distinguish the *Nash case*. The point has been misconceived or disregarded ever since although repeatedly urged.

The Solicitor General in the case at bar concedes (Government Brief p. 21) that proof of acts in furtherance of the conspiracy within the period of limitations was necessary, but the Solicitor General ignores our claim that some of such acts should have been pleaded. It is possible, too, that your Honors overlooked this vital point.

A case in point arose in the New York State courts, *People* v. *Hines*, 284 N. Y. 93. The conspiracy count in the indictment was held to be fatally defective for failure to allege overt acts committed within the Statute of Limitations, although the indictment filed May 26, 1938 charged that the conspiracy continued from March 1931 through January 13, 1937.[23]

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ment's demurrer to the plea in bar, relate to prosecutions in which overt acts were alleged. He states in his brief:

"'It might be added that as far as my research reveals, there is not a single authority which ever passed on an indictment which merely alleged the bare conclusion of the continuance of the conspiracy without overt acts to support it and held that such an indictment was sufficient to preclude a plea in bar based on the statute of limitations.'

"* * * But it is to be observed that at common law it was not necessary to allege or prove the performance of any acts in furtherance of conspiracy, and the practice has only come into use through statutory enactment in specific instances. The Sherman Act punishes the conspiracies at which it is aimed on the common law footing, and decisions as to relations of a subsequent overt act have no bearing upon a statute that does not contain the requirement that an overt act or acts be completed. *Nash* v. *United States*, 229 U.S., 373."

[23] The statutory period of limitations was two years.

Overt acts were alleged to have been committed prior to the statutory period. Under the New York law, overt acts are necessary to make conspiracy a crime. The necessity of overt acts for such purpose is not to be confused with their necessity to establish venue and to avoid the Statute of Limitations. Our point is that when the proof of overt acts are necessary for any such vital purpose they must be in the indictment.

Another Circuit Court of Appeals case has been decided since our petition for certiorari in this court, *Pinkerton* v. *United States*, 145 F. (2d) 252, (C.C.A. 5) holding that an overt act within the statutory must be alleged and proved.

For the purpose of this petition for certiorari, we assume, as a premise, that there could be such a thing as a continuing conspiracy and that under the Anti-Racketeering Act a good indictment could be drawn in some cases without an allegation of overt acts or a description of the means to be employed, for instance, where the conspiracy was formed in the district of trial and the indictment returned within three years. Our point is that such allegations were vitally necessary in the case at bar in order to fix venue and to avoid the Statute of Limitations as against the attack made.

Venue.

As we said in our Summary of Point One (our Brief p. 14):

> "Where an indictment alleges the formation of the conspiracy in a district (New York) as the sole basis of venue, without alleging the commission of any overt act in furtherance of the conspiracy, and the proof shows the formation of the conspiracy in another district (Illinois), the trial Court is without jurisdiction even though there be proof of the commission of unalleged overt acts within the trial district."

During the trial, as is shown by the record, the government made no pretense at claiming that the conspiracy was formed in New York. In this court the Solicitor General practically admits the falsity of the allegation (p. 18) and requests your Honors to adopt the legal fiction that the conspiracy was renewed in New York.[24]

It has been held that failure to properly allege venue is inexcusable in view of constitutional right to trial in district wherein the crime was committed. (*Bratton* v. *United States*, 73 F. (2d) 795, 798 (C.C.A. 10). See *Grigg* v. *Bolton*, 53 Fed. (2d) 158, (C.C.A. 9), *United States* v. *Linton*, 223 Fed. 677.) No authorities should be required to support our claim that the method adopted by prosecution in the case at bar was inexcusable. It was dishonest and purposely deceptive.

In answer to our assertion that the allegation that this conspiracy was formed in the district of the trial was false (our petition, p. 12, our brief p. 14), the government referred your Honors to the Anti-Racketeering Act (Appendices pp. 3-4) which provides [420 (d)] that prosecution may be had where any part of the offense was committed. The record does not show any reliance upon this section below and we gave the government brief no heed on this in our reply. It is possible that your Honors were deceived, but hardly probable. Section 420 d is a useless piece of legislation. The law remains as it had been established, and your Honors must know that Congress has

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[24] We demonstrated the inapplicability of the cases cited here by the government in our reply brief (pp. 1, 2).

The evidence pointed to in this court by the Solicitor General and designated as overt acts within the district of trial and within the three year term is open to dispute also, but such contest is beside our main point, *i. e.*, that no allegation of them was attempted.

no power to extend jurisdiction (*Weinberg* v. *United States*, 126 Fed. (2d) 1004).[25]

Prejudice Created.

The government claimed here that no prejudice resulted from the errors committed, and the Circuit Court of Appeals said that the variance was trivial. If your Honors were influenced by such argument, your Honors have misconceived the rule against variance between pleading and proof. That rule depends upon the fundamental principle that an accused is entitled to be advised in advance of the charge he is to meet.[26]

Notice in advance of trial as to these jurisdictional allegations was essential to proper preparation. A defendant could prepare to contest the jurisdiction of the court in many ways. He could claim that he was not connected in any way with the acts performed, and that they were not related to the conspiracy charged. Armed with such a defense he would not be required to travel a thousand miles prepared to defend transactions of his entire life and the undisclosed movements of his alleged associates. Your honors must realize also that when the government said in their indictment that the conspiracy was formed in New York, a defendant had a right to prepare himself

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[25] This is an afterthought by the Solicitor General. If the pleader had relied upon Section 420 d the indictment would have contained an allegation that part of the offense had been committed in New York by one of the conspirators. Such an allegation is necessary under the statute as it would be without the statute.

[26] *Guilbeau* v. *United States*, 288 Fed. 731, (C.C.A. 5), *Meyers* v. *United States*, 3 Fed. (2d) 379, 380 (C.C.A. 2), *United States* v. *Byers*, 73 Fed. (2) 419, 422 (C.C.A. 2), *Kutler* v. *United States*, 79 Fed. (2) 440, 442, (C.C.A. 3), *Malaga* v. *United States*, 57 Fed. (2) 822, 825 (C.C.A. 1), *Heitman* v. *United States*, 5 Fed. (2) 887 (C.C.A. 9), *Hoppett* v. *United States*, 11 U.S. 389

to meet that allegation alone. If that could not be proved, he should win in New York and should be permitted to go home. He should not be required to meet some different charge or the theory advanced for the first time in this court.

It is possible that your Honors have overlooked a conflict between the Second and other circuits as to Section 556 Title 18 U.S.C. We quote from our brief (p. 21):

> "The Circuit Court regarded our points as trivial and said that it was curious that we should complain at all, in view of Section 556, Title 18 U.S.C. Of course, your Honors know that constitutional provisions cannot be qualified or amended by statute or decisions. (*Asgill* v. *United States*, 60 Fed. (2d) 780.) In circuits other than the second, it has been held that Congress did not intend to change the law at all, but merely enacted into statute the rule as to harmless error, directing that formal defects be disregarded. (*Little* v. *United States*, 73 Fed. (2d) 861, 866 (C.C.A. 10) where authorities are collected.) (See dissent in 137 F. (2d) 995 (C.C.A. 2).)

The government, in opposition to our petition, relied upon *Berger* v. *United States*, 295 U. S. 78, 83. A study of that case will show that as to Berger, he was convicted of the conspiracy charged. Variances concerning his co-defendants were immaterial. Without mentioning the *Berger case* your Honors departed from it in *McCandless* v. *United States*, 298 U. S. 342. See *Lynch* v. *Oregon Lumber Co.*, 108 Fed. (2d) 283, 286 (C.C.A. 9).[27]

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[27] We quote from the *McCandless case* (347):

> "We think equally it constitutes no ground for sustaining the ruling of the trial court as non-prejudicial. * * *
>
> "In this situation, Sec. 269 is not controlling. That section simply requires that judgment on review shall be given after an examination of the entire record 'without regard to technical errors, defects, or exceptions which do not affect the

We did not participate in the trial below in the case at bar, but may we suggest but one fatal step which may have been brought about by the variance. The defendants did not take the stand or offer any defense to the merits. Can it be that they were advised that a court of review would be compelled, under the constitution, to reverse the case? If the law is as we understand it to be, such a move would have been wise. It would shorten the record and not furnish evidence to be used in a subsequent prosecution.

When the prosecuting authorities deliberately deprive a defendant of rights guaranteed by the constitution, and the courts below refuse relief, we do not understand that it is necessary to convince this court of the actual damage resulting from the loss of constitutional rights. We trust that upon reconsideration your Honors will perceive that the error was prejudicial, and that it should be corrected.

Reasons for Granting Rehearing.

We have pointed to decisions subsequent to our petition and we trust that we have made our right to consideration more clear. Some one on the brief for the Solicitor General has studied the record carefully in an effort to show that our claim can be avoided on some technical ground. The fact remains that these defendants were transported for trial in violation of constitutional rights known to the school boy.

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substantial rights of the parties.' This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial. *United States* v. *River Rouge Co.*, 269 U.S. 411, 421; *Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 82; *Williams* v. *Great Southern Lumber Co.*, 277 U.S. 19, 26."

When German spies landed upon our shores, your Honors were careful to see that they were accorded equal justice under law. Your Honors knew that most of the public would have applauded an immediate execution of the saboteurs. The Chief Justice said in *Ex Parte Quirin*, 317 U. S. 1, 25:

> "Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty."

We do not concede the guilt of your petitioners although we have refrained from a discussion of the evidence. There is not one law for the guilty and another for the innocent. It is laudable that we, as a nation, demonstrate our concept of justice to the dictator nations, but we submit that at the same time it is just as important that our courts demonstrate to our own citizens that the constitution stands firm, and that this is a government of laws not men.

We are not asking your Honors to reverse this conviction at this stage of the proceeding. If it is to be affirmed, we submit that the bar, the public and these defendants are entitled to know the reasons. Upon reconsideration we hope that your Honors will perceive that the mere fact that the Circuit Court of Appeals refused to state our point is a blot upon public justice. An ostrich can not conceal itself by hiding its head in the sand any better than this point can be concealed by terming it trivial. A large portion of the public knows of our point. The natural inference from the failure on the part of the Circuit Court to state our point is that that court

knew that the law affords no answer. If our point is unanswerable, the case should be reversed. If it is trivial, as said by the Circuit Court of Appeals, the constitution is trivial, and if your Honors fail to uphold that instrument, no one will. It is but a scrap of paper.

Your Honors have embarked upon a reform in Criminal Procedure in the new rules. It is our opinion that the new rules will allow a trial court to afford such trial as the court may see fit in the particular case. The great danger is that the constitution will mean nothing. A defendant will have lost in two courts below, on a matter committed by the rules to the discretion of the trial court before application is made here for certiorari. It will be next to impossible for him to enter this court under such conditions. We submit that it is important that this court expound clearly in the case at bar the meaning of the constitutional right to a trial in the district. No previous case has presented the matter so clearly, and the question is bound to arise as long as the government persists in choosing a place of trial calculated to be unfavorable to a defendant. In all of the cases heretofore decided by your Honors, the indictment contained facts from which it could be seen that the government had a legal right to claim venue in the place chosen. In the case at bar, the government resorted to falsity. Is such practice to be condoned when the Circuit Court of Appeals is of the opinion that the result is justified by the means? Are such matters committed to the discretion of the court? Are they trivial? If such practice is to prevail, defendants may be prosecuted in any part of the country chosen by the government by a mere allegation that the conspiracy was formed in the district of trial. A variance need never be feared by the government in any case.

We request that your Honors reconsider our petition for certiorari in the light of the recent holding of this court in *United States* v. *Johnson,* 323 U. S. 273, aforementioned; from which we quote (276):

> "There are matters that touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests. These are important factors in any consideration of the effective enforcement of the criminal law. They have been adverted to, from time to time, by eminent judges; and Congress has not been unmindful of them. Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed."

We respectfully pray for a rehearing, and that certiorari be granted upon such terms as may seem just.

Respectfully submitted,

WM. SCOTT STEWART,
Counsel for Petitioners.

Certificate.

I, Wm. Scott Stewart, counsel for the above-named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

WM. SCOTT STEWART,
Counsel for Petitioners.